

### **REMARKS/ARGUMENTS**

At present, claims 1-9 and 19-21 are pending in the present application and currently stand rejected. More specifically, claims 1-9 and 19-21 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Jeziorowski (U.S. Patent No. 4,859,010) in view of German document (DE 10121804 A1) and further in view of Rankin, VI (U.S. Patent No. 6,464,089). This rejection is respectfully traversed.

Initially, it should be noted that the German patent document has an effective prior art date of November 7, 2002. The present invention was conceived at least as early as May 8, 2001 and actually reduced to practice when a prototype of the invention was built on May 29, 2001. Evidence of the conception and actual reduction to practice has been attested to in the attached declaration submitted under 37 C.F.R. § 1.131. Accordingly, the Applicant respectfully submits that the German document is not proper prior art under § 103(a) and should be removed from the combination presented by the Examiner. More specifically, the German patent document was not available to the public prior to the conception date and subsequent reduction to practice of the present invention and, thus, cannot properly be employed to support a prima facie case of obviousness.

In the outstanding Office Action, the Examiner relies upon the Jeziorowski reference to teach a refrigerator having at least one shelving unit adapted to support items thereon. The Examiner correctly recognizes that Jeziorowski lacks a retainer assembly for securing items on the at least one shelving unit, with the retainer assembly including a divider element mounted for movement along a defined axis relative to the at least one shelving unit and dividing the at least one shelving unit into first and second laterally spaced storage zones as required by claims 1 and 19, and a biasing member urging the divider element in a predetermined direction as required by claims 3 and 5. The Examiner relies upon the German document to teach a retainer assembly for securing

items on a shelving unit, with the retainer assembly including a divider element mounted for movement along a defined axis relative to the shelving unit and dividing the shelving unit into first and second laterally spaced storage zones. The Examiner relies upon Rankin, VI, which is directed to a pusher for a merchandise dispenser, to teach a biasing aspect of the present invention.

Initially, it should be noted that Rankin, VI and Jeziorowski are not at all concerned with securing items on a refrigerator shelf to prevent items from toppling when a refrigerator door is opened. Rankin, VI is simply directed to a mechanism for urging items forward in a merchandise display after a selected item has been removed from the display. That is, Rankin, VI is concerned with ensuring a constant presence of items in a merchandise display and is not at all concerned with retaining items in a shelving unit on a refrigerator door. Therefore, the Applicant respectfully submits that there is simply no motivation to combine the references in the manner suggested by the Examiner, particularly given that the Rankin, VI reference pertains to a fore-to-aft biasing arrangement for a product shelf typically found in a grocery store and the German document is directed to a lateral divider for a refrigerator shelf.

In addition, the Applicant submits that providing a biasing force to the divider disclosed in the German patent document would actually destroy the teachings in the reference. That is, the divider disclosed in the German patent document not only divides a shelf, but also serves as a support for one or more product containers through arcuate notches 9 and 9'. Also note that notches 9 and 9' are arranged on opposing sides of the divider so as to enable the divider to be employed in multiple orientations. Adding a biasing member to the divider would not only destroy the ability of the divider to be employed as a support for product containers, but would also eliminate the flexibility of the divider to be employed in the multiple configurations desired by the reference.

As stated in the M.P.E.P. and as widely known in case law, the mere fact that prior art may be modified in the manner suggested by the Examiner does not make the modification obvious unless the prior art suggest a desirability of the modification. As stated above, neither Jeziorowski or Rankin, VI suggest any motivation for or desirability of retaining items in a shelf of a refrigerator door in a biased manner as proposed by the Examiner. As also stated in the M.P.E.P., it is impermissible to use the claimed invention as an instruction manual or blueprint to piece together the teachings of the prior art so that the claimed invention is rendered obvious. In the instant case, the Examiner is using impermissible hindsight to pick and choose among isolated disclosures in the prior art to duplicate the claimed invention. More particularly, the Examiner has combined a non-analogous prior art reference directed to biasing items on a merchandise display to modify a shelf divider in a refrigerator without any motivation taken from the known prior art. Also, the prior art cannot be combined if the combination destroys or teaches away from the disclosure presented.

Claims 3 and 5 are rejected under § 103(a) as being unpatentable over Jeziorowski as modified by the German document and Rankin, VI as applied to claim 1, with the German document being employed to teach a divider and Rankin, VI a biasing member. As stated above, there is simply no motivation to combine Rankin, VI with the German patent document to teach biasing a shelf member for a refrigerator. More particularly, given that the Rankin, VI reference pertains to a fore-to-aft biasing arrangement for a product shelf typically found in a grocery store, there is certainly no motivation to combine Rankin, VI with the divider depicted in the German document. More particularly, given that the divider employed in the German document is employed not only to divide a product shelf but to act as a support for product containers, biasing the divider actually teaches away from an important aspect of the invention outlined in the German document. That is, as stated above, given that the divider outlined in the German document is provided with one or more arcuate notches 9 and 9' for supporting round or circular article product containers, biasing the divider towards one end of a product shelf would prevent the divider from supporting products in a manner required by the invention.

With respect to claim 19 which presents a method of retaining food items on a shelving unit of a refrigerator, none of the prior art, when taken singly or in combination, teaches automatically shifting a divider element against food items to retain food items in a first storage zone in a snug configuration while a second storage zone is maintained available as additional storage space. Again, as outline above, combining Rankin, VI with the German document to teach biasing a divider in a manner suggested by the Examiner would actually destroy the teachings of the German reference as the divider would no longer be suitable for supporting product containers upon arcuate notches 9 and/or 9'.

With respect to many of the dependent claims, the Applicant respectfully submits that none of the prior art, when taken singly or in combination, teaches various recited specifics. For example, the biasing element constituting a spiral spring that is attached to at least one shelving unit as recited in claim 6, or attaching the biasing element through an opening in the shelving unit as required by claim 8 is simply not disclosed or suggested by the known prior art. In the combination suggested by the Examiner, at best, the entire Rankin, VI device would simply be dropped into a shelving unit such as in Jeziorowski and positioned against the divider of the German document and would not, as the Examiner suggests, form part of a shelving unit itself so that the spring would extend through an opening thereof.

Based on the above remarks, it is respectfully submitted that the present invention is patentably defined over the prior art of record such that allowance of all claims and passage of the application to issue is respectfully requested. In addition, the relied upon German reference does not constitute effective prior art such that the overall combination should be withdrawn. If the Examiner should have any additional questions or concerns

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regarding this matter, he is cordially invited to contact the undersigned at the number provided below.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Everett G. Diederiks, Jr.", written over a horizontal line.

Everett G. Diederiks, Jr.  
Attorney for Applicant  
Reg. No. 33,323

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**DIEDERIKS & WHITELAW, PLC**  
12471 Dillingham Square, #301  
Woodbridge, VA 22192  
Tel: (703) 583-8300  
Fax: (703) 583-8301